

IN THE MATTER OF	:	BEFORE THE
BETHEL MINISTRIES, INC.	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 12-028C&V

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DECISION AND ORDER

On April 29, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use and variance petitions of Bethel Ministries, Inc. to expand a private academic school in R-SA-8 ((Residential: Single Attached))/R-12 (Residential: Single) zoning districts, pursuant to Sections 131.N.48 and 130.B.2 of the Howard County Zoning Regulations.

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Petitioner. Jakob Hikmat, Pastor Green and Alice Green testified in support of the petition. Michele Allen also testified, but not in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Photographs of the Savage Volunteer Fire Department
2. Elevations and plans of proposed gymnasium

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the 6th Election District on the east side of Savage Guilford Road about 250 feet north of Baltimore Street (the Property). The Property is referenced as Tax Map 47, Grid 11, Parcels 768, 725 and 537 and is also known as 8925 Lincoln Street and 8435 and 8455 Savage Guilford Road.

2. Property Description. The irregularly shaped 5.39-acre Property comprises three parcels.

Parcel 768. This 3.65-acre irregularly shaped parcel fronts approximately 213 feet on Guildford Savage Road. This parcel is the sole subject of the prior Board of Appeals decisions and orders for the private academic school. The northern portion of the Property is zoned R-12 and the south area (the location of existing improvements), R-SA-8. The improvements include a two-story brick building with a rear addition. There are two playgrounds, one near the south property line and a second, north of the building addition. Two mobile classroom trailers are located on the north side of the church building, which is surrounded by asphalt paving.

South of the building is an ingress-only driveway and 32 angled parking spaces. The driveway continues around the rear of the building. On the building's north side are 3 parking spaces. Two disabled spaces are located on this building's northeast side. Along the north, side lot line are 15 parking spaces, and spaces for 3 additional parking areas. To the west of these

parking spaces is a one-way, egress-only driveway. The parcel's north section is the site of an athletic field.

Parcel 537. This R-12 zoned, 21,000 sq. ft., rectangular parcel adjoins the northwest corner of Parcel 768 and is improved with a single-family detached dwelling scheduled to be removed during Phase II for a new parking lot.

Parcel 725. This 1.18 acre, irregularly shaped R-12 zoned lot adjoins the north side of Parcel 768 and is the site of the former Savage Volunteer Fire Station. It fronts about 185 feet along Lincoln Street. The former fire station building sits in the northeast portion of the site and about 50 feet from Lincoln Street. Parking spaces on the west side of the fire station are depicted on the Plan as 2 feet from the property line. On the south side is a double-loaded parking lot with ten existing spaces and 2 proposed spaces adjacent to the fire station's south side. Two of the 14 spaces farthest from the fire station are used for a dumpster. The shed in this parking area will be removed.

3. Vicinal Properties. To the east, the R-12 zoned lots have rear yards abutting the Property and are each improved with a single-family detached dwelling. To the south, the lots are each improved with a single-family detached dwelling. The B-1 (Business: Local) Parcel 720 is the site of a realtor's office and the B-1 zoned Parcel 417 is the site of the Savage Post Office. To the west, across Savage Guilford Road, the R-12 zoned parcels are each improved with a single-family detached dwelling. To the north, across Lincoln Street, are R-12 zoned lots.

4. Roads. Savage Guilford Road has one travel lane in each direction within an ultimate 50-foot right-of-way (ROW). The posted speed limit is 30 MPH. Lincoln Street has one travel lane in each direction within an ultimate 50-foot right-of-way.

5. Water and Sewer Service. The Property is served by public water and sewer.

6. The General Plan. PlanHOWARD2030 designates the Property as "Established Community" on the Designated Place Type Maps. The Functional Road Classification Map depicts Guilford Savage Road as a Minor Collector and Lincoln Street as a local road.

7. Zoning History. There is a significant zoning history for a private academic school and religious facility associated with the Property and this history is set forth in the TSR. This history includes the Board of Appeal's approval of the conversion of a former elementary school for a private academic school in 1984 and several subsequent approvals to expand the school. In 1998, the Board of Appeals approved a special exception to expand a private academic school and variances to reduce the 30-foot use setback from a collector street ROW to 16.4 feet for parking and the 20-foot setback from a lot line to 10 feet for a driveway, subject in pertinent part to a 365-maximum student enrollment (BOA Case No. 98-039E&V). DPZ has twice approved a temporary use to allow the school to use the fire station for a storage building.

8. The Conditional Use and Variance Petitions to Expand the Private Academic School. The Petitioner proposes to expand the school in three phases. According to the petition and Conditional Use/Variance Plan (the Plan), this expansion involves requests for the maximum allowable reductions to the 50-foot use setback in 3 areas of the Property under

§131.N.48.f for the proposed gymnasium, service road and parking uses on Lots 768 and 537.

Petitioner is also seeking 3 variances from what the Plan (General Notes 12, 13 and 14) describes as reductions under §131.N.48.f to what is stated as the required 20-foot setbacks on Lot 725 for parking and portions of a drive aisle and fire station. The TSR states a seventh reduced setback under §131.N.48.f is also required for the fire station and this is addressed in Part I of the Conclusion of Law. For convenience, the requested reduced setbacks are hereonin referenced as Requested Setback No. 1, 2, 3, 4, 5 and 6.

9. Phase I. The former fire station on Parcel 725 would be converted into a school building serving grades 5-8. Access to this school is to be provided from Lincoln Street via an ingress-only driveway on the west side of the Lincoln Street lot line. The driveway provides access to two drop-off lanes and one through lane between this building and Lincoln Street. These lanes access a dedicated egress driveway on the easternmost portion of the Lincoln Street lot line. The ingress-only driveway additionally serves as a drive aisle and service road for paved parking areas on the west and south sides of the proposed school and continues south to provide access to the proposed parking lot on Parcel 537, as well as existing parking for the church and school on Parcel 768.

Requested Setback No. 1. Petitioner is requesting a variance to reduce the 20-foot use setback to 17 feet to allow 14 sq. feet of the existing fire station to be used for school purposes (denoted as Variance Area #2 on the Plan). The Plan depicts a Type C+ landscape buffer in this area and a 55-ft., 6-ft. high white plastic screening fence along a portion of adjoining Lot 10 in the area of the encroachment (New Fence #1). The petition states this fence will be installed, in

combination with the landscaping, to present an attractive and effective buffer for neighboring properties.

Reduced Setback No. 2. The Plan depicts 16 parking spaces and a portion of the drive aisle 2 feet from the west property line. Petitioner requests the Hearing Examiner to reduce the 20-foot use setback for these uses to 2 feet (denoted on the Plan as Variance Area #1 and referencing General Note #12). A new 140-foot long, 6-foot high, white, opaque plastic screening fence is depicted along a portion of the west property line (New Fence #2), as well as a narrow landscaped area and an existing 6-foot wood opaque fence. Beyond this proposed fencing is an existing 6-foot wood opaque fence.

Requested Setback No. 3. Petitioner is seeking a reduction of the 50-foot use setback for the eastern portion of the parking area to the south of the fire station to 20 feet for existing and new parking spaces. The Plan depicts a combination of existing fencing and landscaping in excess of the required Type "C" heavy buffer (a "C+" buffer). According to the petition, the Petitioner will replace the existing fence with 6-foot high solid fencing if requested by adjoining property owners (New Fence #3).

Requested Setback No. 4. On the fire station's north lot line (Lincoln Street), the Plan depicts two 12-foot drop-off lanes and one 12-foot through lane. Because a portion of these lanes encroaches in what the Plans depicts as 20-foot use setback from a public street ROW, Petitioner requests a variance from §§ 131.N.48.f and 109.D.4.b.(2) to reduce the 20-foot use setback to 3 feet (denoted as Variance Area #3 on the Plan and referencing General Note #14). The Plan depicts a new landscaped area between Lincoln Street and the three lanes.

Phase II. In this phase, Petitioner would add a new gymnasium (including 8 classrooms), parking lot and outdoor play area. The gymnasium would be constructed on Parcel 768, about 20 feet from the rear of the existing church building. The new parking lot and drive aisles would utilize most of Lot 537, excepting perimeter landscaping and several landscaped islands.

Requested Setback No. 5. Because the gymnasium would encroach 20 ft. into the 50 ft. setback from residentially zoned properties required under §131.n.48.f, Petitioner requests a setback of 30 feet. A Type C+ landscape buffer is proposed along the gymnasium's east property line. The petition states Petitioner will replace existing fencing along the property lines of adjoining properties with 6-foot high solid fencing should the property owners request it (New Fence #4.) A new outdoor play area would be sited on this building's west side.

Requested Setback 6. The Parcel 538 dwelling would be demolished, replaced by a new, 37-space parking lot, with access from the internal service road traversing Lot 725 as well as a drive aisle on the southwest side. A second access drive is proposed off Savage Guildford Road. The parking lot spaces on the lot's north side and the internal service road on Lot 725 would encroach into two 50-ft. setbacks from residentially zoned properties required by §131.N.48.f, and for this reason Petitioner is requesting a reduction of these setbacks to 20 ft. The petition notes an existing wood fence varying in height from 4-6 ft. along the common lot line with the adjoining residence and states Petitioner will replace the existing 4-ft. height fencing with 6-foot high solid fencing along the property lines if the property owner so requests (New Fence #5).

Phase III. The Phase III expansion would add a new library to the north side of the existing church building and would not significantly increase this building's footprint.

The Variance Petition includes a narrative supplement explaining the need for the variances and their compliance with the variance approval standards. It explains the existing firehouse building, parking area and drive aisle on Parcel 725 are lawfully noncomplying structures or uses under §§ 128.B, and eligible for the requested variances in part because they constitute unique physical features (as discussed in Part IV).¹ The petition cites to three Hearing Examiner decisions granting variances for noncomplying structures considered unique physical conditions of the property.

Additional Changes. Two modular classrooms on the church's north side will be removed, but as the TSR comments, it is unclear under which phase this would occur. When Phase I and II are completed, enrollment will rise and cap at 510 students. Currently, 27 full-time staff and 3 part-time staff support the school, with 10 part-time staff for extended cares. The converted fire station could add 11 full-time staff and 2 part-time staff. The petition also

1 Section 128.B Noncomplying Structures and Uses.

1. A structure or use which does not comply with current bulk requirements, but which complied with the requirements in effect when it was constructed, may remain in place and may be maintained or repaired as necessary.

2. Any additions to the structure or use must comply with current bulk requirements unless a variance is granted with the following exceptions:

a. An addition to a single-family detached dwelling may encroach into a front setback without a variance, provided that the addition encroaches no further into the front setback than the existing dwelling.

b. The architectural features listed in Sections 128.A.1.A through 128.A.1.C may be added to a building without a variance, provided the features does not extend further out from the current building than the maximum setback encroachment allowed by those sections.

c. A previously unoccupied but reserved burial plot in a cemetery may encroach into a setback without a variance, provided that plot encroaches no further into the setback than an occupied burial plot along the same property boundary.

states the school will provide before and after care for all students, beginning at 7:00 a.m. and ending at 6:00 p.m. Outdoor lighting will comply with Howard County regulations, will be directed downward and shielded to minimize any impact on adjacent properties.

10. Jakob Hikmat, project engineer, testified to the proposed expansion of the school onto the former fire station parcel (Parcel 725) and the single-family residential lot (Parcel 537). The expansion will occur in 3 phases. Phase I involves the renovation of the fire station for school use, including relatively minor modifications to the facades, and additional paving on the east side of the fire station. A driveway on the east side of the fire station is being removed, being in the 20-foot setback. Green space will be added between Lincoln Street and the drop-off area for the school (parallel to Lincoln St.). In Phase II, the gymnasium (with 8 classrooms) will be added. A new library within the existing school will be added during Phase III.

11. Concerning the Technical Staff Report (TSR), Mr. Hikmat testified that the TSR comments about front setback lines generally apply only to single-family dwellings, and that there may be multiple front setbacks for other uses. He disagrees with the TSR conclusions about variances (discussed in Conclusions of Law, Part I). Mr. Hikmat also commented on the TSR's conclusion that a variance is not required for the encroachment of the drop-off/pick-up through lanes, noting that the Petitioner is still requesting the variance and that it meets the criteria for approval. Additionally, the requested variance will improve the appearance from Lincoln Street by bringing the use into greater conformance with current setbacks and through additional landscaping. He also testified that the firehouse likely dates from the 1950s and will

meet district height restrictions. The Plan proposes 123 parking spaces for the Property (or 122 spaces based on the TSR calculation), instead of the required 85. Mr. Hikmat explained these additional parking spaces were added in response to requests from the community to minimize on-street parking in the neighborhood.

12. Concerning the TSR comments that the use, as expanded, is a notable increase in the intensity of the school and further, that the requested reduced setbacks may indicate the site is too small to support the proposed use, Mr. Hikmat explained the requested reduced setbacks are a function of the site's uniqueness and the practical challenges of expanding the use over many years. Had the entire program been proposed at one time, the project could be designed to minimize the need for lesser setbacks.

13. Mickey Cornelius testified to the safe access of the site. The sight distance at the existing driveway on Savage Guilford Road is acceptable. Sight distance at the Lincoln Street ingress/egress driveways is also good.

14. Principal Alice Green testified to the school's existence since 1984. There are currently two campuses. Campus One on another site includes grades K-4. Campus Two, the church site, includes grades 5-8. Depending on growth, both schools would be located on the church site. The current after-school, evening and weekend school use of the site for sports and other activities will continue.

15. Neighbor Michele Allen testified to sometimes hearing the sounds of children playing outside.

CONCLUSIONS OF LAW

I. The Application of §131.D.4, the Variance Petition and Use Setbacks

Section 130.B.2 establishes the Hearing Authority's power to grant variances from the parking requirements and bulk regulations established in the Zoning Regulations, excluding density and minimum lot size requirements, subject to compliance with the four standards for granting variances set forth in §§131.B.a.(1)-(4). The exception language of Section 131.B.a.(5) precludes the granting of a variance to the minimum criteria established in §131 for conditional uses, except where specifically provided therein or in an historic district.

With respect to the private academic school conditional use category, §131.N.48.f imposes a minimum 50-ft. use setback from residentially zoned properties other than a public road ROW. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district subject to certain standards. The TSR recommends the proposed conditional use expansion be denied, reasoning in part that Section 131.B.a.(5) is an absolute bar to use of the variance petition process to further reduce the §131.N.48.f alternative minimum setback available.

A spirited colloquy on this subject ensued between counsel and the Hearing Examiner at the outset of the hearing, wherein Counsel posited §131.D.4 authorizes the requested variances, the language of §131.B.a.(5) notwithstanding.² Section 131.D.4 authorizes the Hearing Authority to approve variances to the § 131 bulk regulations (in accordance with the

variance provisions of §130.B.2) for modifications and expansions of existing conditional uses approved prior to the effective date of Council Bill No. 11-2001, and conditional uses filed on or before March 5, 2001, and approved after the effective date of Council Bill No. 11-2001.

The Hearing Examiner ultimately reasoned she could make no legal determination as to the applicability of §131.D.4 to the proposed expansion independent of a hearing and decision on the merits of the petition, where neither the Zoning Regulations nor the County Code authorize the Hearing Examiner to issue a quasi-judicial declaratory ruling, as it were. The Hearing Examiner subsequently referred the issue to DPZ pursuant to Hearing Examiner Rule 10.4.³ The May 21, 2013 memo to DPZ requested DPZ to clarify and update the TSR to address to the applicability of §131.D.4 to the proposed expansion of Bethel Ministries in relation to the language of §130.B.2.a.(5). DPZ's June 18, 2013 response from Planning Director Marsha McLaughlin, explained that §131.D.4 has not been utilized previously in relation to a petition where a variance to §131.N bulk regulations are sought for a newly incorporated parcel of an approved conditional use. DPZ concurred that §134.D.4 could be subject to more than one interpretation (including its application to a parcel which was not part of the Conditional Use site), but is more confident in interpreting the section as applying to only the original property of an approved Conditional Use. The response further expresses DPZ's greater confidence in

² The Hearing Examiner observed during the hearing that Plan General Note 15 states "[t]his project is an expansion of an existing conditional use approved prior to CB-11-2001 and as per Sections 131.D.a and D.4 of the Howard County Zoning Regulations.

³ Hearing Examiner Rule 10.4 authorizes the hearing examiner to refer an issue in a case to DPZ for the purpose of clarifying or updating the record before making a decision. DPZ's written response is provided to all parties, who may comment on or challenge DPZ's response.

extending the provision to noncomplying or longstanding structures rather than such uses as parking areas or driveways not included in prior Board of Appeals decisions. However, recognizing the need of an approved Conditional Use to expand over time, DPZ registered its lack of objection to an interpretation by the Hearing Examiner extending the necessary latitude to support the Petitioner's position that the petition is eligible for all requested variances, subject to compliance with the four variance standards (DPZ's variance request position). Petitioner's July 5, 2013 comments on DPZ's response to the 10.4 request notes its support for DPZ's variance request position, it more more accurately reflecting the legal status of conditional uses as being area, not lot specific.

Upon consideration, the Hearing Examiner is disinclined to interpret the ambiguous language in §131.D.4 as applying only to expansions or modifications on original lot/s, and construes the ambiguity in favor of the petitioner. "[Zoning] ordinances are in derogation of the common law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language." *Landay v. Zoning Appeals Board*, 173 Md. 460, 465-66, 196 A. 293, 295-96 (1938)(internal citations omitted.) The Court of Appeals more recently emphasized the continued importance of the Landay statement and general rule in *Trail v. Terrapin Run*, 403 Md. 523, 943 A.2d 1192, 1200 (2008) (decided on other grounds), with respect to the analysis of land use issues affecting fundamental constitutional rights of property owners.

Heeding the Landay rule, the Hearing Examiner reasons the proposed private academic school expansion is eligible for all requested variances, subject to compliance with all four variance standards. To interpret the ambiguous §134.D.4 otherwise would impermissibly extend its application to petitions not clearly within the scope of its language.

The Hearing Examiner addresses here also the TSR comment that a fourth reduction in the 50-foot setback is required for the entire east side of the fire station and further that the 7.5-foot side setback depicted on the Plan is incorrect. This appraisal hinges on evaluating the three lots comprising the Property as a single lot, with the Savage Guilford Road frontage previously established as the front setback and the east lot line the rear lot line subject to a 30-foot rear setback. The TSR also maintains the Plan and variance petition incorrectly request variances from a 20-foot use setback, not the 50-foot conditional use setback or the minimum alternative setbacks.

The variance petition states the requests are for relief from §§ 131.N.48.f and 109.D.4.b.(2), which impose, respectively, a 50- or 20-ft. conditional use setback, and a 20-foot or 0.0-foot zoning-district use setback.⁴ The Plan petition narrative supplement likewise states Petitioner is seeking a reduction of the 50-foot setback to 2 feet, with a fence and landscape buffer. It appears to the Hearing Examiner that by this language Petitioner is requesting, effectively, the minimum alternative setback (20 or 30 ft.) to the 50-ft. use setback, where applicable, as well as a further reduction of these setbacks to the distance set forth in the

variance petition. On balance, the Hearing Examiner concludes this approach is consistent with both DPZ's variance request position and Petitioner's reliance on §131.D.4, even as it eliminates an initial request to reduce the 50-foot conditional use setback to 20 feet. Petitioner is also proposing C+ type landscaping buffers fencing commensurate with the requirements of §131.148.f for the variances adjoining residential properties and a landscape buffer between Lincoln Street and the drop-off/pick-up/through lanes.

The Hearing Examiner lastly concurs with the Petitioner's reliance on the nonconformity of the corner portion of the fire station and parking spaces to its west under Section 128.B.1.⁵ Being nonconforming, they are unique physical conditions. This has been Hearing Examiner policy since the establishment of the Board of Appeals Hearing Examiner process in 2000.

II. General Criteria for Conditional Uses (Section 131.B)

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed Plan will be in harmony with the land uses and policies indicated in the Howard

⁴ The TSR explains the 1977 Zoning Regulations did not impose a specific setback for nonresidential uses.

⁵ Section 128.B Noncomplying Structures and Uses.

1. A structure or use which does not comply with current bulk requirements, but which complied with the requirements in effect when it was constructed, may remain in place and may be maintained or repaired as necessary.

2. Any additions to the structure or use must comply with current bulk requirements unless a variance is granted with the following exceptions:

a. An addition to a single-family detached dwelling may encroach into a front setback without a variance, provided that the addition encroaches no further into the front setback than the existing dwelling.

b. The architectural features listed in Sections 128.A.1.A through 128.A.1.C may be added to a building without a variance, provided the features does not extend further out from the current building than the maximum setback encroachment allowed by those sections.

County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

PlanHOWARD2030 designates the Property as "Established Community" on the Designated Place Type Maps. An expanded private academic school affiliated with a long-established religious facility is presumptively compatible with an established community. The majority of activities and uses will occur indoors and the outdoor uses will be well-separated from vicinal residential uses. The proposed increase in students will be capped at 510 students, which is below the allowed 539-student limit. Certainly, the use will intensify, but the private academic school is a long-standing facility and the proposed use is consistent with other expansions of private academic schools associated with small religious facilities. Mr. Cornelius' testimony about the location of the streets giving access to the site raises no concerns. The proposed expansion will be combined with an existing religious facility and private academic school.

The conditional use category authorizes a lesser setback subject to certain conditions. The same objective guides both the 50-foot setback and the alternative minimum setback, some balance between adjoining land uses. In the Hearing Examiner's view, the proposed

c. A previously unoccupied but reserved burial plot in a cemetery may encroach into a setback without a variance, provided that plot encroaches no further into the setback than an occupied burial plot along the same property

request for the three alternative minimum setbacks indicates only that the Petitioner can comply with the screening mitigation requirements. The same reasoning applies to the variance requests, which as discussed in Conclusions of Law Part IV, comply with the standards for granting variances.

Moreover, there is no evidence that the proposed adaptive reuse of the fire station and the proposed gymnasium in combination with the existing religious facility and private academic school are inappropriate. Absence any indicators that the proposed increase in intensity of use in an established community is inappropriate by impact of the reduced setbacks, the Hearing Examiner concludes the proposed expansion is appropriate.⁶

B. Adverse Impacts. Unlike §131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under §131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed uses would have adverse effects in an R-SA-8 and R-12 district. The proper question is whether there are facts and circumstances showing

the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence under §131.B.2 of the Zoning Regulations to establish the proposed expansion will not have adverse effects on vicinal properties beyond those ordinarily associated with a private academic school in the R-SA-8 and R-12 district.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The new outdoor playground will be located to the west of the gymnasium, which will buffer the use. The proposed use will be conducted predominately indoors. The gymnasium itself would be located 30 feet from the eastern lot line. In addition to the Type C+ landscape buffer proposed along the common lot lines where the gymnasium, parking areas and converted fire station are proposed, the Petitioner is proposing to replace/install new 6-foot high solid fencing. Three of these 5 fences depicted on the Plan would be installed only if the adjoining property owners request it.

⁶ The Hearing Examiner here observes that the sole community resident who attended the hearing did not speak in opposition to the petition.

In the Hearing Examiner's view, the possibility of these 3 fences implicitly recognizes the potential atypical physical conditions of the use (or that the fencing is warranted even with the proposed buffers and setbacks for the use to be appropriate to the site pursuant to §131.B.1.) Additionally, Petitioner's Exhibit 2 includes floor plans for the gymnasium. These plans indicate the location of 7 classrooms on the first-and second story and windows facing out to the adjoining eastern residential properties, such that neighbors may hear both indoor and outdoor activities or be exposed to indoor institutional lighting. To ensure any such physical conditions are mitigated the Hearing Examiner is conditioning approval on the installation of all 5, 6-foot fences, replacement or new, including where such installation is left to the discretion of the adjoining property owners.

Lastly, although the issue did not arise during the hearing, the Hearing Examiner is concerned about the dumpster location so close to residential properties. With the expansion, the dumpster may also be serviced more frequently. The dumpster truck would need to either back up or turn around to access the dumpster. Truck beeping and dumpster lifting are noisy activities. Because there appears to be many other areas in the Property interior for a dumpster, the Hearing Examiner is requiring Petitioner to relocate the dumpster in an interior location as far from neighboring residential properties as possible. Subject to this condition, the proposed use will not generate inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will

not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Existing fencing and landscaping, as well as the proposed C+ landscaping will screen these areas. Additionally, as a condition of approval, the Hearing Examiner is requiring Petitioner to install all new or replacement fencing with a 6-foot solid fence, wherever noted on the Plan and in the petition. With these fences and the proposed landscaping, the proposed expansion will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The proposed parking exceeds the amount required. The requested reductions in driveway and parking area setbacks comport with the standards for granting them. The proposed drop-off, pick-up area will be screened by landscaping.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

Petitioner witness Mickey Cornelius testified to the safe access and adequate sight distance of the existing and proposed drives.

III. Specific Criteria for Structures Used Primarily for Schools, Colleges, Universities – Private

Academic (Section 131.N.48)

- a. The maximum density permitted is 60 pupils per acre for lots less than three acres, and 100 pupils per acre for lots three acres or greater.**

The proposed number of students at the private academic school on the 5.39-acre site is 510, below the 539-student maximum enrollment cap. The petition accords with §131.n.48.a.

- b. In addition to meeting the area requirements of Section 131.N.54.a, schools with residence accommodations shall provide an additional 500 square feet of lot area per site resident. Residents shall include students, staff members, caretakers and their families who reside on the site.**

This section is inapplicable as no residential accommodations are proposed. The petition accords with §131.n.48.b.

- c. A private school may be erected to a greater height than permitted in the respective district, provided that no structure is more than three stories in height and the front, side and rear setbacks shall be increased two feet for each foot by which such structure exceeds the height limitation.**

This section is inapplicable, as no building will be erected to a greater height than three stories. The petition accords with §131.n.48.c.

- d. Sufficient off-street school bus loading areas shall be provided if bus service is provided for students.**

No change to the existing bus service or bus loading and parking is proposed. The petition accords with §131.n.48.d.

- e. Outdoor uses will be located and designed to shield residential property from noise or nuisance. Play areas, athletic fields and similar uses shall be buffered from residential properties by fencing, landscaping, adequate distance or other appropriate means.**

A new playground is proposed to the west of proposed gymnasium, which will shield residential property from noise or nuisance. Its location is a substantial distance from residential properties. The petition accords with §131.n.48.e.

f. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially zoned properties other than a public road right-of-way. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater if:

- (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development; or**
- (2) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring properties.**

The Petitioner is seeking a reduction in the private academic school, 50-foot setback in 3 areas.

Requested Setback No. 3. Petitioner requests the Hearing Examiner to reduce the 50-foot use setback to 20 feet for the eastern portion of the parking area south of the fire station on Parcel 725. The Plan depicts a combination of existing fencing and landscaping in excess of the required Type "C" heavy buffer (a "C+" buffer). According to the petition, the Petitioner will replace the 4-foot high existing fence with 6-foot high solid fencing if requested by adjoining property owners (New Fence #5). For the reasons discussed above in the adverse impact evaluation, the Hearing Examiner has determined that the 6-foot high fence should be installed whether requested by adjoining neighbors or not, because the expansion will cause an increase in use during school hours, after school, evenings and weekends. A Conditional Use also runs with the land, and may continue long beyond the residency of adjoining properties owners. The

new fence and proposed landscaping will provide an attractive and effective buffer. For this reason, the Hearing Examiner is reducing this setback to 20 feet, as conditioned.

Requested Setback No. 5. Petitioner requests a reduction of the 50-foot setback to 30 feet for the proposed gymnasium on the east lot line of Parcel 768. A Type C+ landscape buffer is proposed along the gymnasium's east side. The petition states Petitioner will replace existing fencing along the property lines of adjoining properties with 6-foot high solid fencing along the property lines of those property owners who so request (New Fence #4). The Hearing Examiner is approving the 30-foot setback and requiring the installment of the 6-foot high fence, whether or not neighbors request it, for the same reasons explained in reference in Requested Setback No. 3.

Requested Setback 6. The internal service road and parking lot spaces proposed on Lot 537 encroach into two 50-foot setbacks. Petitioner is therefore requesting a reduction of these setbacks to 20 feet. The petition states Petitioner will replace the existing 4-foot high fencing with 6-foot high solid fencing along the property lines if the property owner so requests (New Fence #5). The Hearing Examiner is approving the 30-foot setback, including the requirement that Petitioner install the 6-foot high fence, whether or not neighbors request it, for the same reasons explained in reference in Requested Setback No.3.

The petition accords with §131.n.48.f.

g. At least 20 percent of the area within the building envelope will be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

Although the Plan does not calculate the amount of green space to be provided, the TSR concludes at least 20 percent will be green space. The petition accords with §131.n.48.g.

h. The site has frontage on and direct access to a collector or arterial road designated in the General Plan, except that expansions of a conditional use that was approved prior to the effective date of Council Bill No. 11-2001 are permitted.

The Property fronts on and has direct access to Savage Guilford Road, a Minor Collector, and is an expansion of a conditional use approved prior to the effective date of Council Bill 11-2001, in compliance with §131.n.48.h.

II. The Requested Variances (Section 131.B.2.a)

Petitioner is requesting the variances as follows.

Requested Setback No. 1. Petitioner is requesting a variance to reduce the 20-foot use setback to 17 feet to allow 14 sq. feet of the existing fire station to be used for school purposes (denoted as Variance Area #2 on the Plan.)

Requested Setback No. 2. From the requested 20-foot reduced setback, Petitioner is seeking a variance to reduce this use setback to 2 feet (denoted as Variance Area # 1 on the Plan).

Requested Setback No. 4. Petitioner is requesting a variance from the 20-foot use setback to 3 feet between the existing fire station and the Lincoln Street ROW for a pick-up/drop-off area (denoted as Variance Area #3 on the Plan.)

The standards for variances are contained in 130.B.2.a of the Regulations. This section provides a variance may be granted only if all of the following determinations are made:

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

In this case, the variance petition states the existing fire station, parking areas and drive aisles are lawfully noncomplying structures or uses to the bulk regulations of §§ 131.N.48.f and 109.d.4.b.(2) and eligible for variances from the setbacks imposed by these provisions under §§ 128.B, in part, because their compliance constitutes unique physical features. Also pertinent here is the TSR's determination that no variance is required for Requested Setback No. 4 because the existing paved area in front of the fire station likely complied with the 1977 Zoning Regulations then controlling. The requested variances accord with §130.B.2.a .(1).

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

The private academic school expansion includes Type C+ buffers and fencing in the area of the proposed expansions and the Hearing Examiner is requiring all 6-foot solid fencing shown on the Plan to be installed as a condition of approval. The additional parking spaces depicted on the site are intended to reduce off-street parking, as requested by the community. There is no evidence that the granting of the variances will substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare. The requested variances accord with §130.B.2.a.(2).

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The Petitioner did not create the practical difficulties or hardships. The petition accords with §130.B.2.a.(3).

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Petitioner is not seeking to expand the size or height of the former fire station and desires to utilize the parking areas within the setback for off-street parking intended to reduce the amount of on-street parking when school activities require additional parking spaces. The proposed gymnasium is a reasonable size. The proposed expansion is a reasonable use. The petition accords with §130.B.2.a.(4).

ORDER

Based upon the foregoing, it is this **22nd day of July 2013**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the conditional use and variance petitions of Bethel Ministries, Inc. to expand a private academic school in R-SA-8 (Residential: Single Attached) and R-12 (Residential: Single Family) zoning districts is hereby **GRANTED**;

Provided, however, that:

1. The use shall be conducted in conformance with and shall apply only to the November 2012 Plan for an expansion of a private academic school as described in the petition and as depicted on the Plan and not to any new structures or uses on the Site or any additions thereto.
2. The Petitioner shall remove the temporary classrooms before the start of the school year or semester in which the school utilizes the gymnasium classrooms.
3. Petitioner shall relocate the dumpster to an interior location as far from neighboring properties as possible.
4. The Petitioner shall comply with all applicable federal, state, and county laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.